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No. 08–807

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In the Supreme Court of the United States

BRAD LIEBERMAN, PETITIONER

v.

THE PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

REPLY BRIEF IN SUPPORT OF CERTIORARI

KIMBALL R. ANDERSON
Counsel of Record
MARY PATRICIA BENZ
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558–5600

Counsel for Petitioner

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INTRODUCTION

The Brief In Opposition ("Opp'n") filed on behalf of the State of Illinois pejoratively asserts that Petitioner requests "mere error correction" based upon his mischaracterization of the evidence in the record. (Opp'n 1.) To the contrary, Petitioner asks the Court to review this case because the Illinois Appellate Court refused to apply the principles of Due Process that this Court articulated in *Kansas* v. *Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997) and *Kansas* v. *Crane*, 534 U.S. 407, 122 S. Ct. 867 (2002). The Illinois Appellate Court deviated from those principles, and it further refused to define the quantum of evidence about lack of volitional control that is constitutionally mandated for post-incarceration civil commitment of sex offenders. The decision below deprived Petitioner of liberty without Due Process of law. Equally significant, its opinion will stand as authority that, at best, dilutes the importance of this Court's decisions in *Hendricks* and *Crane*, and at worst, eliminates their requirements altogether.

ARGUMENT

The Constitutional Question Of Whether A Convicted Sex Offender May Be Committed In the Absence Of Clear And Substantial Evidence Of Present Difficulty Controlling Behavior Is Squarely Presented By Petitioner's Case.

This Court has it made clear (and the State agrees) that not all convicted sex offenders may be civilly committed after their sentence of imprisonment ends. (Opp'n 9.) As this Court framed it, the issue is whether the offender facing

commitment presently suffers from "serious difficulty in controlling behavior," to be distinguished from the "dangerous but typical recidivist convicted in an ordinary criminal case" who cannot be civilly committed. *Crane*, 534 U.S. at 413. Petitioner's case presents a serious constitutional question about the quality and quantum of evidence necessary to make that decision—a question that directly affects his own case and thousands like it. The Appellate Court upheld the commitment order without so much as acknowledging the effect of the wealth of evidence demonstrating that Petitioner did not meet the constitutional requirements for civil commitment.

Even if the Appellate Court had applied the correct legal standard (which it did not), its decision nevertheless contradicts *Hendricks* and *Crane*. The Appellate Court's focus on Petitioner's past crimes is an error of law that is flatly in conflict with those decisions. *See Hendricks*, 521 U.S. at 360–361; *Crane*, 534 U.S. at 412.

The State does not challenge Petitioner's assertion that the following testimony was given by the State's experts at trial (Pet. 3–5):

- Dr. Jacqueline Buck testified that Petitioner presently possessed the ability to choose whether he will act on any urges he may experience. (Tr. Vol. 7 at 104.) "Q. Brad had volitional control because he is not mentally ill, is that true? A. You bet. That's true." *Ibid.* Lack of control and predisposition are different. (*Id.* at 103–104.) Petitioner's mental disorders may have predisposed him to

commit acts of sexual violence, but they do not reduce his ability or capacity to control his behavior. (*Id.* at 104, 105, 107, 109–110.) "All of his behavior over the past well–documented 26 years screams he has volitional control, volitional capacity. There is no doubt about that." (*Id.* at 109–110.) "Q. He has volitional capacity? A. Yes, and control. Q. And control? A. To do what he wants." (*Id.* at 110.) Petitioner's past and present behavior is completely consistent with full volitional control. (*Id.* at 108–109.)

- Dr. Barry Leavitt agreed that "under certain circumstances . . . [Petitioner] is capable of controlling his behavior." (Tr. Vol. 16 at 18.) Dr. Leavitt testified that Petitioner's mental disorders "affect" his volitional control. (*Id.* at 19.) Like Dr. Buck, however, he never testified that Petitioner lacked control or had any serious difficulty in controlling his behavior. Dr. Leavitt admitted that: "[I]n most situations in the last 26 years he's able to control his impulses." (*Id.* at 18–19; Tr. Vol. 9 at 174.) "Q. He's able to control his impulses? A. That is correct." (*Id.* at 175.)

If *Hendricks* and *Crane* have any meaning at all, the question presented by the foregoing evidence about Petitioner's *present volitional control* cannot be avoided: does this evidence allow the continuing deprivation of Petitioner's liberty or not? It light of its misapplication of this Court's precedent, however, the Appellate Court here did not engage that question at all.

The State's Opposition misses the point. The State uses ambiguous jargon (e.g., "color his viewpoint," "warps his perceptions," "impact . . . emotional and volitional control") and recitation of past offenses and discipline (e.g., "he was identified by sixteen women as having committed . . . sexually violent offenses," "he was disciplined five times for drugs or drug paraphernalia") in an effort to mask the legal issue presented here. (Opp'n 2–5.) Notably, the State even relies upon rank hearsay about Petitioner's alleged misconduct in prison—evidence that was not allowed to be considered for its truth at trial or on appeal but rather was recited by the State's experts in support of their opinions under an Illinois evidence rule based upon an old version of Federal Rule of Evidence 703.[1] (Opp'n 2–3.)

The State's non-answer to the constitutional question, like the Appellate Court's, is that the jury can decide the key constitutional issue in this case (about which it was not instructed) based upon other "ample" evidence. (Opp'n 11, 13.) But what kind of evidence—and how much—is "ample?" Neither evidence of a predisposition to violence, nor evidence of "dangerousness," is enough to support commitment. *Hendricks*, 521 U.S. at 357–358. In cases like this one, which sit at the intersection of

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[1] *See Wilson* v. *Clark*, 84 Ill. 2d 186, 195–96, 417 N.E.2d 1322, 1327 (Ill. 1981) (adopting the pre–2000 version of Fed. R. Evid. 703). Current Federal Rule 703 would limit or prohibit the use of inadmissible evidence relied upon by an expert if the prejudicial effect of the evidence outweighed its probative value. Ironically, the State in its Opposition violated the trial court's limiting instructions that the evidence could not be considered for its truth. (Opp'n 2–3.) That evidence cannot be used to support the judgment or to deny review by this Court.

science and law, careful judicial review of the psychiatric evidence is essential. *See Crane*, 534 U.S. at 413–414. Here, where virtually all of the evidence was expert testimony, i.e., beyond the ken of the average juror, the jury should have been given less discretion, not more, to interpret the evidence in the face of a serious constitutional challenge to its sufficiency. *See People* v. *Mertz*, 218 Ill. 2d 1, 842 N.E.2d 618 (Ill. 2005) (expert testimony is admissible when a qualified expert offers knowledge and application of principles beyond the ken of the average juror). Because the Appellate Court refused to answer the dispositive question about the required quantum of evidence, its judgment—and the law of Illinois—now conflicts with this Court's clear precedent.

Civil commitment of a convicted sex offender after imprisonment ends is not permitted in the absence of substantial competent proof that the offender presently suffers from "serious difficulty in controlling behavior." *Crane*, 534 U.S. at 412-413; *see also Hendricks*, 521 U.S. at 357-358. The State acknowledges that the Appellate Court failed to cite or discuss *Hendricks* and *Crane*, but it argues that the court nevertheless applied the principles of those cases when it discussed another Illinois Appellate Court decision, *In re Detention of Traynoff*, 358 Ill. App. 3d 430, 831 N.E.2d 709 (2005). (Opp'n 8, 10.)

But the Appellate Court's discussion of *Traynoff* demonstrates the very error about which Petitioner complains. The Appellate Court used that Illinois decision to bootstrap its unsupportable legal conclusion, namely that a finding of serious difficulty in controlling behavior was "implicit in the jury's

verdict." Pet. App. 22a, 24a. Stated differently, the Appellate Court held that generic pre-*Crane* language in the Illinois Sexually Violent Persons Commitment Act ("SVPCA"), 725 ILCS 702/1–702/99 (2006), allowed the jury to make a specific finding about the constitutional predicate for commitment in the absence of any rule defining the quantity or quality of the requisite evidence.

The Appellate Court's silence about *Hendricks* and *Crane* not only sets up a clear conflict between the law of Illinois and the Court's precedent, but it will also create confusion for other courts in similar cases. As noted in the Petition, other courts have hidden behind vague pre-*Crane* statutory language to uphold commitment orders and avoid claims based upon lack of sufficient evidence. (Pet. 10–12.) Here the Appellate Court used the imprecise language in the SVPCA to trump the considerable evidence in the record demonstrating that "all of [Petitioner's] behavior over the past well documented 26 years screams he has volitional control, volitional capacity." (Tr. Vol. 7 at 109–110.) This Court should grant the Petition to direct courts, and offer assurance to Petitioner and others like him, that a reasonable and fair determination about the present ability of the individual offender to control violent behavior must be made in every case.

In sum, Petitioner's assertions are not the slightest bit "cavalier." (Opp'n 11.) Absent review by this Court, the Appellate Court's opinion threatens to eviscerate the Due Process protections guaranteed by *Hendricks* and *Crane*.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

KIMBALL R. ANDERSON
Counsel of Record
MARY PATRICIA BENZ
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558–5600

Counsel for Petitioner

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